90-2080

No. 89-_____

In the

Supreme Court of the United States

October Term, 1989

HENNEPIN TECHNICAL CENTER,
JOINT INDEPENDENT SCHOOL DISTRICT NO. 287,
ROGER LEE, individually and in his official capacity
as Director of HTC,
ED FOLEY, individually and in his official capacity
as Personnel Director of HTC,
and RONALD M. CARTER, individually and in his official
capacity as Superintendent of District No. 287,
Petitioners,

vs.

LINDA J. HAWKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In lawsuits alleging that an employer discriminated against a female employee in the terms and conditions of her employment because of sex, are trial courts *required* to admit evidence describing a non-party coworker's acts of sexual harassment of non-parties, even though the plaintiff does not allege that she was sexually harassed?

2. In lawsuits alleging that an employer engaged in employment discrimination by *retaliating* against a female employee because she complained that non-parties were being sexually harassed, are trial courts *required* to admit evidence describing a non-party coworker's acts of sexual harassment?

3. In lawsuits alleging employment discrimination in which the plaintiff does not claim to have been sexually harassed, are trial courts *required* to admit evidence that the plaintiff was sexually harassed by an employee who is not a party and had no part in the decisions of which plaintiff complains?

PARTIES TO PROCEEDINGS BELOW

See caption of the case.

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The decision of the United States Court of Appeals for the Eighth Circuit is reported at 900 F.2d 153 (8th Cir. 1990) and reproduced in the Appendix at A-2 to A-9.

The Findings of Fact and Conclusions of Law and Order for Judgment of the United States District Court for the District of Minnesota, Fourth Division, is unreported and reproduced in the Appendix at A-10 to A-37.

JURISDICTION

The Court of Appeals' decision was filed on April 5, 1990. Petitioners asked the Court of Appeals for rehearing en banc. This request was denied on May 25, 1990 by an Order reproduced at A-1. Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. Fed. R. Evid. 401.
2. Fed. R. Evid. 402.
3. Fed. R. Evid. 403.
4. 42 U.S.C. § 2000e-2(a) (1982) of Title VII of the Civil Rights Act of 1964.
5. 42 U.S.C. § 2000e-3(a) (1982) of Title VII of the Civil Rights Act of 1964.
6. Minn. Stat. § 363.03, subd. 1(2) (1982) of the Minnesota Human Rights Act.
7. Minn. Stat. § 363.03, subd. 7 (1982) of the Minnesota Human Rights Act.
8. 42 U.S.C. § 1983 (1982).
9. U.S. Const., amend. XIV, § 1 (equal protection).

All constitutional provisions, statutes, and rules are reproduced in the Appendix at A-38 to A-44.

STATEMENT OF THE CASE

This case presents the important question of the scope of evidence admissible in litigation involving sex discrimination in employment. Because of great national concern with these issues, the Supreme Court has decided many employment discrimination cases. The Supreme Court has never, however, defined the scope of evidence admissible in such a case.

Trial courts are given a wide range of discretion when excluding evidence under Rule 403 of the Federal Rules of Evidence. The Court of Appeals' decision, however, requires the admission of a broad spectrum of collateral evidence concerning non-parties and claims outside of the pleadings. By eliminating the discretion of the trial court in this case, the Court of Appeals' decision creates a trial of undue length, in effect requiring the parties to try multiple separate lawsuits in a single trial. This ruling, if allowed to stand, will require the admission of evidence that will confuse juries, impose additional burdens on the calendars of trial courts, and waste time. Supreme Court guidance is needed to define the scope of evidence admissible in sex discrimination lawsuits.

I. Facts

Plaintiff claims that defendants discriminated against her in the terms and conditions of employment by transferring, laying off, denying "bumping" rights, and failing to recall plaintiff because of her sex. Plaintiff also claims defendants took these adverse employment actions against her because she complained that an instructor was sexually harassing a student. Plaintiff, however, alleges no cause of action for sexual harassment.

Defendant Hennepin Technical Center ("School District") is a Minnesota public school district providing vocational and technical education to adult students. Plaintiff Linda Hawkins began employment with the School District as a vocational counselor in 1977. As a counselor, plaintiff was subject to the collective bargaining agreement between the School District and the teachers' union.

On July 1, 1981, the School District transferred plaintiff from her counseling position at the School District's north campus to a student support service manager position at the south campus because a more senior employee was returning to a counseling position after having worked for a short time as a school administrator. (Tr. vol. IV, p. 123-25)

On June 30, 1982, plaintiff was laid off from her support service manager position because the School District was losing approximately $500,000 in student support services funding for the upcoming 1982-83 school year. (Tr. vol. V, p. 61)

Plaintiff claims that when she was laid off, she was denied her right to "bump" a north campus support service manager named Stephanie Corbey. Plaintiff was not entitled to bump Corbey, however, because she did not have the necessary license and experience, as required by the collective bargaining agreement. (Tr. vol. V, p. 173-78)

Plaintiff contends she should have been hired or recalled to any of three positions which opened before her recall rights expired in June 1985. The School District did not recall plaintiff to these positions because she, again, was not licensed and qualified, as required by the collective bargaining agreement. (Tr. vol. IV, p. 141)

From late 1980 to early 1981, plaintiff counseled a student who claimed to have been sexually harassed by an instructor, David Baranek, in the School District's dental laboratory technology program. (Tr. vol. II, p. 110-13, 118-20) The instructor was plaintiff's coworker. He was not a supervisor, manager, or administrator of the School District and had no authority to make any decisions regarding plaintiff's employment. Plaintiff does not contend she was sexually harassed by the instructor.

Plaintiff alleges she complained to School District administrators about the instructor's misconduct. (Tr. vol. III, p. 113-18, 120-24, 138-40) Plaintiff testified to what she believed to be inaction by the School District in response to her complaints. (Tr. vol. III, p. 117, 123-24, 140) Plaintiff also testified that she felt the School District retaliated by reassigning her to the south campus (Tr. vol. III, p. 142-47),

denying her the opportunity to bump Corbey (Tr. vol. III, p. 147-50), laying her off, and never rehiring her (Tr. vol. III, p. 147).

Plaintiff produced other employees and students to testify that they complained to school administrators about the instructor's sexually harassing behavior. (*See* testimony of Dennis Knapp, Tr. vol. I, p. 77-79, 83; Joanne Trader, Tr. vol. I, p. 154-60; Nancy Jo Paulson, Tr. vol. II, p. 15-23, 27-28; Brigitte Adams, Tr. vol. III, p. 141-47, 153).

Plaintiff's witnesses further tesitified to what they believed to be inaction by the School District as a result of the complaints and to what they perceived as retaliation by the School District. (*See* testimony of Dennis Knapp, Tr. vol. I, p. 80-81; Joanne Trader, vol. I, p. 157, 159-64; Nancy Jo Paulson, Tr. vol. II, p. 21, 23-25, 29-30; Brigitte Adams, Tr. vol. III, p. 145-51, 156-57, 162-66).

Plaintiff made an offer of proof with respect to six other witnesses: five students and one former School District employee. According to plaintiff's attorney, these witnesses would have testified about the details of the instructor's sexual harassment, that they complained to the adminstration, and that nothing was done about the complaints. (Tr. vol. III, p. 4-10) Although the District Court consistently ruled throughout trial that complaints of sexual harassment to the adminstration and its response were admissible, plaintiff chose not to produce these witnesses.

Plaintiff also made an offer of proof regarding sexual harassment committed against herself, even though she did not allege sexual harassment in her Complaint. (Tr. vol. III, p. 11-12) Plaintiff contends the sexual harassment was committed by James Rossbach, her supervisor when she was first employed by the School District. The sexual harassment allegedly was committed in 1977 and 1978. Plaintiff asked not to be supervised by Rossbach. Pursuant to this request, the School District transferred plaintiff. Plaintiff does not claim this transfer was discriminatory nor does she state a cause of action for the alleged sexual harassment.

II. Decisions of the Courts Below

Plaintiff commenced this action in the United States District Court for the District of Minnesota, Fourth Division. She alleged she was transferred, laid off, denied "bumping" rights, not rehired, and denied equal pay because of her sex. she also alleged that the School District subjected her to these adverse employment actions in retaliation for her opposition to the instructor's sexual harassment. Plaintiff did not allege a cause of action for sexual harassment against herself.

Plaintiff based her claims upon 42 U.S.C. § 1983 (1982); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1982); and the Minnesota Human Rights Act, Minn. Stat. § 363.01, *et seq.* (1982). The District Court invoked jurisdiction over the federal law claims pursuant to 28 U.S.C. § 1331, and exercised pendent jurisdiction over plaintiff's state law claims. The trial was assigned to United States Magistrate Patrick J. NcNulty pursuant to 28 U.S.C. § 636(c).

All claims were consolidated into one trial. The trial lasted twelve days and resulted in an eight-volume transcript.

Defendants brought motions in limine on the first scheduled trial day. One of these motions asked the District Court to preclude plaintiff from mentioning any act of sexual harassment committed against anyone other than plaintiff. (Tr. vol. I, p. 9) The District Court made the following ruling, which presents the central issue in this appeal:

> Plaintiff occupied a position as counselor at Hennepin Technical Center and alleges that she received reports of alleged sexual harrassment [sic] by an instructor from female students. Her claim is that she was discriminated against in terms and conditions of employment in retaliation for reports and opposition raised to this alleged misconduct.
>
> Evidence of Plaintiff's involvement in reporting allegations of the students and in opposing the alleged

misconduct is relevant to her claims under the Equal Employment Opportunities [sic] Act and state law. Relevancy, however, is limited to evidence which establishes that student complaints were made and of the ensuing events. The truth of the complaints is not relevant to Plaintiff's claims, and beyond characterizing the complaints as pertaining to sexual harassment, the details of the alleged complaints are not relevant.

Plaintiff shall be and hereby is foreclosed from introducing any evidence of sexual harassment of third-parties save and except to the extent that Plaintiff will be permitted to introduce evidence that sexual harassment complaints were made to her by students, that she reported the complaints to her superiors, of any objections to any alleged sexual misconduct which she voiced to her superiors, of ensuing conversations or communications with her superiors, or events of [sic] occurrences which thereafter transpired which tend to prove that Defendants retaliated by discriminating against Plaintiff in terms and conditions of her employment. The evidence will not be received as evidence of the truth of the alleged complaints by students, but will only establish that the complaints were made to Plaintiff.

(Tr. vol. I, p. 9-11) The District Court's ruling resulted in part from plaintiff's Complaint, which made "no claim of sexual harassment against any individual Defendant or any other individual . . ." (Tr. vol. 1, p. 7)

Throughout trial, the District Court consistently ruled that (1) details of acts of sexual harassment by the instructor against other employees and students *were not admissible*, (2) complaints of sexual harassment to School District administrators by plaintiff and her witnesses *were admissible*, and (3) the School District's response, whether it was inaction or retaliatory in nature, *was admissible*.

Defendants also asked the District Court to preclude plaintiff from mentioning any act of alleged sexual harassment against herself. The District Court ruled as follows with respect to this motion in limine:

From the file, the Court is able to discern that Plaintiff has made statements concerning alleged sexual harassment by an employee of the Hennepin Technical Center who is not a party to this action in 1977 and 1978. No formal allegation of sexual harassment against this Plaintiff [sic] has been made. The preliminary statement in the Complaint refers only to freedom from sexual discrimination in employment and freedom from retaliation for opposition to sexual harassment. In the facts section, virtually the same allegations are made. The clause in count I under Section 1983 merely incorporates these allegations by reference.

Sexual discrimination in employment is distinguishable from harassment. Sexual discrimination consists of sexually based treatment. Sexual discrimination can exist without sexual harassment. If the two exist, the two become intertwined, but the one may not necessarily be two, and that is the situation here.

Plaintiff makes no claim of sexual harassment against any individual Defendant or any other individual, and evidence that she was subjected to sexual harassment by someone else some years before events relevant to the liability of these Defendants occurred can in no way be in consequence to determination of whether or not Plaintiff was laid off, denied bumping rights, not recalled or otherwise discriminated [against] in terms and conditions of employment because of her sex. Evidence of misconduct by a third person at a remote time is not evidence that Defendant committed misconduct of a different nature at some other time. . . . This Court determines that evidence of sexual harassment of Plaintiff by persons not parties to this action is irrelevant, that no allegation of sexual harassment against named individual Defendants is made and that all claims of sexual harassment predating 1982 would be barred by the statute [of limitations] and that such evidence is not admissible.

(Tr. vol. I, p. 6-8) The District Court then ruled that even if the evidence was relevant, it should be excluded under Rule 403 of the Federal Rules of Evidence because the evidence is "highly prejudicial, misleading and confusing." (Tr. vol. I, p. 9)

Plaintiff's section 1983 claim was submitted to the jury, which returned a verdict in favor of defendants. The District Court decided plaintiff's Title VII and Minnesota Human Rights Act claims. The District Court held that the School District transferred, laid off, denied bumping rights, and did not rehire plaintiff for legitimate, nondiscriminatory reasons which were not shown to be pretextual by plaintiff. (A-26 to A-30)

The District Court also ruled in favor of the School District on plaintiff's equal pay claim. (A-25 to A-26) Because the Court of Appeals determined that plaintiff's equal pay claim should not be retried on remand, 900 F.2d at 154 n. 2, defendants do not seek review of the Court of Appeals' decision with respect to that issue.

Finally, the District Court found that none of the adverse employment actions were in retaliation for plaintiff's acts of forcefully advocating the rights of a female student being sexually harassed by the instructor or for the filing of Plaintiff's EEOC discrimination charge. (A-30 to A-37)

In separate appeals, plaintiff appealed the jury's verdict on the section 1983 claim and the District Court's Title VII and Minnesota Human Rights Act decision to the United States Court of Appeals for the Eighth Circuit. These appeals were consolidated.

In a decision filed on April 5, 1990, the Court of Appeals reversed the District Court's evidentiary rulings and remanded for a new trial. The Court of Appeals found that the District Court's rulings unfairly prevented plaintiff from fully presenting her claims, and held as follows:

> [W]e think the improperly excluded evidence to be admitted on remand may be grouped into three categories: (1) some details of the nature of the alleged harassment, (2) all complaints made to the Center supervisors, and (3) disposition of the complaints by

> the administration, particularly evidence of retaliation or inaction. We are mindful that despite these evidentiary exclusions, Hawkins did present a "significant amount of testimony of wide spread complaints of sexual harassment" at the Center. Appellant's Brief 6. The proceedings below took twelve days, and we have before us an eight-volume trial transcript. Nonetheless, evidence of retaliation or inaction following the complaints is plainly relevant. Further, some detail about the alleged harassment is necessary to provide a context for the complaints made to administrative personnel.

900 F.2d at 156.

The Court of Appeals failed to allow the District Court substantial deference with respect to its evidentiary rulings. Moreover, the Court of Appeals did not consider in any meaningful manner the effect of Rule 403 upon the District Court's rulings.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Improperly Interfered with the Trial Court's Discretion to Exclude Evidence Regarding Collateral Issues

The issue presented by this case is narrow: Are trial courts *required* to admit evidence of acts of sexual harassment committed by fellow employees in an employent discrimination case in which sexual harassment is not alleged? The Court of Appeals' decision unduly interferes with the District Court's discretion concerning this issue.

As an initial observation, the Court of Appeals' decision does not accurately reflect the record. The Court of Appeals' decision remands with instructions that evidence of "(2) all complaints made to Center supervisors, and (3) disposition of the complaints by the administration, particularly evidence of retaliation or inaction," is admissible. *Hawkins*, 900 F.2d at 156. This evidence, however, *was* admitted consistently by the District Court

throughout the trial. The District Court only excluded evidence describing the details of the acts of sexual harassment.

Irrespective of the Court of Appeals' decision, therefore, the issue presented by this case concerns the admissibility of evidence describing the acts of sexual harassment only. The Supreme Court has never required trial courts to admit such evidence.

The landmark case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), established the analysis for employment discrimination claims. The plaintiff must first establish a prima facie case of employment discrimination based upon a prohibited factor. *Id.* If the employer satisifies its burden, the plaintiff must then prove the employer's stated reasons are pretextual. *Id.* at 804.

The present case is a disparate treatment, as opposed to a disparate impact, employment discrimination lawsuit. In such cases, the factual inquiry is "[whether] the defendant intentionally discriminated against the plaintiff." *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 709, 715 (1983) (quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). An examination of the intent of the *employer* is the critical issue, whether it be to determine if the employer treated the plaintiff differently because of sex or if the employer retaliated because of the plaintiff's protected activity.

Plaintiff's sexual harassment evidence in the present case, however, has no bearing on the School District's intent. The description of a non-supervisory coworker's sexually harassing behavior is irrelevant to the question of whether the School District transferred, laid off, denied bumping rights, or failed to rehire plaintiff because of her sex or in retaliation for her protected activity.

Plaintiff's sexual harassment evidence tends to establish that her coworker, a fellow instructor, possessed a state of mind by which he was inclined to sexually harass students. The instructor, however, played absolutely no role in the transfer, lay off, bump, and recall decisions. Plaintiff's evidence of the details of the sexual harassment by the

instructor has no relevance to whether the employer or the administrators involved in those decisions intended to treat plaintiff differently because of her sex or because she complained of sexual harassment.

The Court of Appeals' reliance on *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), is misplaced. That case concerned evidence regarding other discriminatory acts of employees actually involved in the adverse employment action claimed to be discriminatory by the plaintiff. The Court of Appeals in *Estes* stated that the other discriminatory acts by those employees should be admitted. *Id.* at 1102-05. By contrast, in this Petition no nexus is shown between the alleged acts of sexual harassment by a non-party and the employment decisions regarding plaintiff.

In *Estes*, the court conceded that evidence of other discriminatory acts would be inadmissible "if the Ford employees allegedly responsible for the discrimination against customers were unconnected with the employees who allegedly fired Estes." *Id.* at 1104 (citing *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1424 (7th Cir. 1986)). In *Hunter*, the Seventh Circuit Court of Appeals stated the following with respect to the admissibility of other discriminatory acts:

> The probative value of other discriminatory acts depends not only on their relevance to the acts of which the plaintiff complains but also on the nature of the discrimination charged. If Hunter were complaining that he had been paid less than white workers for the same work, evidence of the discriminatory behavior of his co-workers toward another black worker might have little or no relevance and its probative value (if any) might very well be greatly outweighed by its effect in prejudicing the jury against Allis-Chalmers and spinning out the trial to inordinate length.

Id. at 1424.

The present case raises the question not presented, but referred to, in *Estes* and *Hunter*. The School District's instructor who engaged in the sexually harassing behavior was "unconnected," *Estes*, 797 F.2d at 1424, with the

transfer, lay off, bump, and rehire decisions regarding plaintiff's employment. Therefore, the Court of Appeals' interference with the District Court's discretion is unwarranted.

Evidence that plaintiff was sexually harassed by another School District employee, James Rossbach, in 1977 also was inadmissible. First, plaintiff's complaint made no allegation against Rossbach. He was not a named defendant, nor did plaintiff's complaint allege that she was a victim of sexual harassment.

Second, Rossbach was the School District's director of off-campus programs. (Tr. vol. IV, p. 163) He indirectly supervised plaintiff when she was initially hired by the School District in 1977. (Tr. vol. III, p. 283) The School District transferred plaintiff to another department in 1978 after she asked to no longer be supervised by Rossbach. (Tr. vol. IV., p. 189) Plaintiff did not claim this transfer was due to her sex or retaliation.

Rossbach was not involved in plaintiff's employment in any manner following her transfer. Plaintiff produced absolutely no evidence indicating that Rossbach was in any way connected with her reassignment from the north campus to the south campus in 1981, her subsequent lay off, or denial of bumping rights.

Regarding plaintiff's claim of failure to recall, Rossbach was on the interview committee for positions at the vocational assessment center. (Tr. vol. IV, p. 186) Significantly, however, Rossbach was not on the committee which screened applicants for assessment center positions. (*Id.*) Rossbach was not involved in plaintiff's failure to receive a position with the assessment center because she never made it to the interview stage. (Tr. vol. III, p. 289)

Finally, sexual harassment by Rossbach was alleged to have occurred in 1977. Even if he was involved in the adverse employment decisions of which plaintiff complains, such remote conduct has no probative value as to whether Rossbach possessed a discriminatory intent with respect to the terms and conditions of plaintiff's employment at least four years later. Nor was this in any way shown to be

connected with decisions made by those people who are defendants. The District Court was well within its discretion to exclude this irrelevant and unduly prejudicial evidence.

The Court of Appeals voiced a concern that "[t]he effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases . . ." *Hawkins*, 900 F.2d at 155. This case, however, does not present such an exclusion. Rather, it involves a ruling – tested by plaintiff's attorney throughout trial – that details of acts of sexual harassment committed by employees unassociated with the employment decisions complained of by plaintiff were inadmissible.

In its concern with "blanket evidentiary exclusions," the Court of Appeals failed to recognize it created a "blanket" rule of admitting unduly prejudicial evidence no matter how remote. Under this rule, it is difficult to envision any improper acts committed by coworkers that would fail the test of relevance to determine the ultimate issue of the employer's intent.

Plaintiff was given a "full and fair opportunity," *McDonnell Douglas*, 411 U.S. at 805, to demonstrate that the School District's legitimate, non-discriminatory reasons were merely pretext for sexually discriminatory and retaliatory decisions. As plaintiff admits, she presented a "significant amount of testimony of widespread complaints of sexual harassment." (Appellant's Brief to Court of Appeals, p. 6). The District Court permitted plaintiff to introduce evidence of many instances of School District students and employees complaining to the administration about sexual harassment. Plaintiff also introduced evidence regarding the administration's response to the complaints, whether it was characterized as inaction or retaliation.

The District Court properly excluded evidence describing the acts of sexual harassment on relevance grounds under Rules 401 and 402. Exclusion was also appropriate under Rule 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed.R.Evid. 403.

Plaintiff's proposed evidence would unfairly prejudice defendants by suggesting they were actively involved in sexual harassment against plaintiff and others. Assuming the evidence describing the acts of sexual harassment has some probative value, it is substantially outweighed by this unfair prejudice. The jury might be led to believe this was a sexual harassment lawsuit, rather than an intentional discrimination and retaliation lawsuit. Arguably, the jury could find the School District liable to plaintiff because the instructor sexually harassed people who were not parties. This situation is unfairly prejudicial to defendants, confusing, and misleading to the jury.

The Court of Appeals' decision requires the parties to try multiple lawsuits within one suit, which results in undue delay and waste of time. In the context of plaintiff's suit against defendants for sex discrimination in employment, defendants will be required to defend suits by at least ten individuals for acts of sexual harassment.[1] The Court of Appeals decision creates an unnecessarily lengthy trial, an undue burden on the defense, an unwarranted burden on the District Court, and confusion for the jury.

II. Supreme Court Review is Warranted to Define the Scope of Evidence Admissible in Employment Discrimination Litigation

The Supreme Court should grant the writ of certiorari in this case because the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court. Supreme Court Rule 10.1.(c).

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[1] Witnesses Helen Jirak, Nancy Jo Paulson, Paulette Steuber, Becky Rusk, Joanne Trader, Karen Smith, Janet Olson, Kathy Carstensen, and Cynthia Mendelson all claim to have been sexually harassed at the School District.

Courts have struggled with the nationally important question of employment discrimination for many years. The Supreme Court has rendered many decisions concerning the analysis and shifting burdens of proof in such cases. *See Price Waterhouse v. Hopkins*, ___ U.S. ___, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *Burdine; Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas*.

Never, however, has the Supreme Court defined the scope of collateral evidence that trial courts are required to admit in a disparate treatment employment discrimination lawsuit. This Petition for Writ of Certiorari presents that issue.

In *McDonnell Douglas*, the Supreme Court made references to the scope of such evidence in *dicta*:

> On remand, [plaintiff] must . . . be afforded a fair opportunity to show that petitioner's stated reason for [plaintiff's] rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. . . . Other evidence that may be relevant to any showing of pretext includes facts as to the petitioners treatment of [plaintiff] during his prior term of employment; petitioner's reaction, if any, to [plaintiff's] legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. [Footnote omitted] On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire [plaintiff] in this case conformed to a general pattern of discrimination against blacks.... In short, on the retrial [plaintiff] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

McDonnell Douglas, 411 U.S. at 804. The Supreme Court, however, was not reviewing the evidentiary exclusions of a trial court in *McDonnell Douglas*. The Supreme Court has never ruled that evidence of acts of sexual harassment committed by non-party fellow employees must be admitted at trial on the issue of intentional discrimination in the terms and conditions of employment.

The importance and value of a Supreme Court ruling on the scope of evidence that trial courts are required to admit in disparate treatment cases is evident. The dockets of state and federal courts are filled with employment discrimination lawsuits. The courts, however, struggle to define the limitations of admissible evidence with no clear guidance.

The present case illustrates the confusion in this area. The Court of Appeals' rule stands for the proposition that any discriminatory act of any employee, no matter how unrelated to the claims of the plaintiff, is admissible as evidence of the employer's intent in a disparate treatment case. This broad, over-inclusive, and unduly prejudicial approach to the admission of evidence is contrary to the Supreme Court's admonition that trial and appellate courts should not "treat discrimination differently from other ultimate questions of fact." *Aikens*, 460 U.S. at 716.

In addition to the nationwide importance of the issue presented by this case, the Supreme Court should accept review because the Court of Appeals' decision conflicts with the Seventh Circuit's decision in *Hunter*. Supreme Court Rule 10.1.(a). In *Hunter* the court stated evidence of discriminatory misbehavior by coworkers has no relevance to allegedly discriminatory decisions made by management. *Hunter*, 797 F.2d at 1424. The Eighth Circuit Court of Appeals' decision is in direct conflict with this rule because it requires the admission of evidence of the discriminatory conduct of a coworker when the question of the intentional discrimination of the employer is at issue.

CONCLUSION

The Supreme Court has never ruled on a question similar to the one presented by this case, even though courts throughout the United States frequently struggle with this issue. Broadly stated, Petitioners ask the Supreme Court to define the scope of admissible evidence in a disparate treatment employment discrimination lawsuit. Specifically, Petitioners ask the Supreme Court to decide whether the discriminatory acts of employees having no involvement in the adverse employment decisions of which plaintiff complains are relevant to show the School District transferred, laid off, denied bumping rights, or failed to rehire plaintiff because of her sex and in retaliation for her protected activity. The importance of a Supreme Court decision on this issue cannot be understated.

Rule 403 of the Federal Rules of Evidence provides trial courts with broad discretion when excluding evidence of nominal probative value due to considerations of unfair prejudice, confusion of the jury, and undue delay. The Court of Appeals in the present case has interfered with the District Court's legitimate exercise of that discretion.

The Court of Appeals' decision sets a precedent having no basis in fairness or equity. Its decision makes all discriminatory conduct in the workplace admissible on the issue of the employer's intent when making employment decisions. Employers, however, cannot be responsible for everything occurring in the workplace.

For each of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 89-5107, 89-5320

Linda J. Hawkins,

Appellant,

v.

Hennepin Technical Center, Joint Independent School District #287, Roger Lee, individually and in his official capacity as Director of HTC, Ed Foley, individually and in his official capacity as Personnel Director of HTC, and Ronald M. Carter, individually and in his official capacity as Superintendent of Dist. #287,

Appellees.

On Appeal from the United States District Court for the District of Minnesota

Submitted: October 9, 1989
Filed: April 5, 1990

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MAGILL, Circuit Judge

ARNOLD, Circuit Judge

Linda Hawkins brought this lawsuit against her former employer, Hennepin Technical Center ("Center"), a Minnesota public educational institution, and two administrative employees of the Center, Roger Lee and Ed Foley,[1] alleging gender discrimination and unlawful retaliation following Hawkins's complaints of sexual harassment of herself and others at the Center. Hawkins claims relief under 42 U.S.C. § 1983, Title VII of the 1964 Civil Rights Act, and the Minnesota Human Rights Act, Minn. Stat. § 363.02(5), (6), and (7). The Title VII and Minnesota Human Rights Act claims were tried before a Magistrate pursuant to 28 U.S.C. § 636(c), and the § 1983 claim was submitted to a jury. The Magistrate directed a verdict in favor of Roger Lee, and the jury returned a verdict in favor of the other defendants on the § 1983 claims. The Magistrate then entered judgment for the defendants on the plaintiff's Title VII and state-law claims.

On appeal, Hawkins argues that the Magistrate committed reversible error (1) by excluding several categories of evidence tending to show a climate of sexual harassment and retaliation at the Center, and (2) by not affording collateral-estoppel effect to findings of fact in a previous judgment against the Center for sexual harassment of a student by the instructor. Because the evidentiary exclusions were erroneous and deprived Hawkins of a full opportunity to present her case to the jury, we reverse and remand for a new trial. We direct the District Court to consider whether offensive collateral estoppel is appropriate in accordance with *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

I.

Hawkins was employed at the Center from July 1, 1977 through June 30, 1982. She began work as an off-campus vocational counselor but transferred to the Center's north

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[1] During the trial Hawkins voluntarily dismissed her claims against a third defendant, Superintendent Ronald M. Carter.

campus in 1978. In late 1980 Hawkins began counseling a student who complained of sexual harassment by an instructor. In the early months of 1981 Hawkins brought the matter to the attention of various administrative officials; she was repeatedly informed that she should not become involved because the matter was to be addressed by the administration. Another vocational counselor, Diane Benson, also complained of sexual harassment to administrators during this period. Hawkins claims to have experienced some sexual harassment herself, prior to her 1978 transfer. Hawkins testified at trial that there were no criticisms of her work before she complained about harassment of herself and other women at the Center.

Later that term Hawkins was informed that she would be transferred, effective July 1, 1981, to the Center's south campus to fill a recently vacated position of Support Services Manager. Hawkins worked at the south campus nearly a year when on June 24, 1982, she and twenty-nine other employees were placed upon unrequested leaves of absence. Soon thereafter, on November 23, 1982, Hawkins filed a charge against the Center with the Minnesota Department of Human Rights. Although Hawkins later applied for other positions at the Center and asserted seniority-based "bumping" rights over a less senior employee, she was not offered any other position. Her recall rights under the relevant union contract expired June 30, 1985.

Hawkins began this lawsuit in December 1985. The complaint alleges that the 1981 transfer, the 1982 unrequested leave of absence, the denial of bumping rights, and the failure to recall before expiration of the contract in 1985 were due to her gender and in retaliation for her

complaints of sexual harassment at the Center. The complaint also alleges that Hawkins was denied equal pay because of her gender.[2]

Addressing Hawkins's Title VII and state-law claims, the Magistrate concluded that the unfavorable employment decisions affecting Hawkins were legitimate and non-descriminatory. The Magistrate found that two men hired as vocational counselors in 1977 received higher starting salaries than Hawkins and two other women because of their prior experience. The Magistrate also found that Hawkins's 1981 transfer to a different job at a different location was an alternative to a projected lay-off due to financial problems at the school. Continuing financial problems led to the elimination of Hawkins's new position in 1982 in accordance with seniority rights under the union contract. The Magistrate further found that the denial of bumping rights and the failure to recall were both valid under the contract because Hawkins was not properly licensed for the positions she sought.

The § 1983 claim was tried to a jury. The Magistrate directed a verdict in favor of Roger Lee, and the jury returned a verdict in favor of the Center and Ed Foley, corresponding with the Magistrate's conclusions that the employment decisions were legitimate and non-descriminatory.

II.

As her first ground of appeal, Hawkins challenges the exclusion of several categories of evidence of sexual harassment of herself and others at the Center. Before trial the Magistrate granted defendants' motion in limine prohibiting Hawkins from introducing any evidence of alleged acts of sexual harassment committed against herself

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[2] Hawkins does not claim that the denial of equal pay was in retaliation for her opposition to sexual harassment, because the alleged wage disparity predates any confrontations between Hawkins and her supervisors over sexual harassment at the Center. Accordingly, because the erroneously excluded evidence has no relevance to this issue, this claim is not to be presented again on remand.

or others. The Magistrate reasoned that such evidence was not relevant because Hawkins made no formal allegation of sexual harassment against any individual defendant: "evidence that she was subjected to sexual harassment by someone else some years before events relevant to the liability of these Defendants . . . can in no way be in consequence to determination of whether or not Plaintiff was laid off, denied bumping rights, not recalled or otherwise discriminated [against] in terms and conditions of employment because of her sex." Transcript (Tr.) 7-8. Further, the Magistrate considered evidence of sexual harassment of others irrelevant beyond the bare fact that a complaint was made: "The truth of the complaints is not relevant to Plaintiff's claims, and beyond characterizing the complaints as pertaining to sexual harassment, the details of the alleged complaints are not relevant." Tr. 10.

The Magistrate also granted a second motion in limine prohibiting Hawkins from making any reference to previous litigation between former students and the Center over alleged acts of sexual harassment. In *Smith, et al., v. Hennepin Technical Center, et al.*, Civil No. 4-85-411 (D. Minn. May 26, 1988), the District Court (Rosenbaum, J.) addressed claims that Joann Trader and Karen Smith experienced sexual harassment and reprisals at the Center from 1981 through 1984. The Court denied relief to Smith but found that Trader had proved unfair discrimination, supporting this conclusion with extensive findings of fact in a sixty-three-page opinion. Hawkins requested that these findings of fact be given collateral-estoppel effect in her own suit, or, in the alternative, that she be allowed to present evidence of those incidents. The Magistrate instead granted defendants' second motion in limine: "The Court fails to see how evidence of this litigation commenced by two students alleging specific acts of sexual harassment has a tendency to prove that sexual discrimination against Plaintiff in terms and conditions of her employment is more probable than not. Prior litigation by the students involved allegations of fact unrelated to Plaintiff's claims, and . . . the danger of unfair prejudice, the confusion of issues and

misleading the jury far outweighs the probative value of the evidence . . .." Tr. 14-15.

A trial court's exclusion of evidence under Fed. R. Evid. 402 and 403 is entitled to substantial deference on review. *Warner v. Transamerica Ins.*, 739 F.2d 1347, 1350 (8th Cir. 1984). In this instance, however, the Court's rulings unfairly prevented Hawkins from proving her case. In *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), we reversed similar evidentiary exclusions in an employment-discrimination suit. Although that case involved a plaintiff who claimed to have suffered discrimination at his workplace on account of his race, and not a claim of unlawful retaliation for opposition to discriminatory practices, the reasoning in *Estes* is compelling here: "The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives . . . . Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices – evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive." 856 F.2d at 1103.

Because an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial. See *McDonnell Douglas v. Green*, 411 U.S. 792, 804-05 (1973); *Patterson v. Masem*, 774 F.2d 251, 255 (8th Cir. 1985) (history of segregation in a school district may be evidence of the district's discriminatory employment practices). Thus, it is not sufficient that the Magistrate allowed testimony that complaints of sexual harassment were made while disallowing testimony concerning the activities complained of and the Center's disposition of the

complaints.[3] Hawkins' claim is unlawful retaliation. But an atmosphere of condoned sexual harassment in a workplace increases the likelihood of retaliation for complaints in individual cases. Hawkins is entitled to present evidence of such an atmosphere.

Appellant's Brief at pages 6-12 lists offers of proof denied by the Court. Of these, we think the improperly excluded evidence to be admitted on remand may be grouped into three categories: (1) some details of the nature of the alleged harassment, (2) all complaints made to Center supervisors, and (3) disposition of the complaints by the administration, particularly evidence of retaliation or inaction. We are mindful that despite these evidentiary exclusions Hawkins did present a "significant amount of testimony of widespread complaints of sexual harassment" at the Center. Appellant's Brief 6. The proceedings below took twelve days, and we have before us an eight-volume trial transcript. Nonetheless, evidence of retaliation or inaction following the complaints is plainly relevant. Further, some detail about the alleged harassment is necessary to provide a context for the complaints made to administrative personnel. Limiting the proof to bare allegations that complaints of sexual harassment were made, without some indication of the nature of the underlying incidents, unfairly prevented Hawkins from fully presenting her claim.

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[3] An illustration may be helpful. The following colloquy between the Court and plaintiff's counsel concerning the 1978 transfer appears in the pre-trial proceedings, Tr. 18:

> MR. BRENNER: Now, how do you want me to refer to what happened initially with Rossbach, because it's her claim that ——
>
> THE COURT: She asked to be transferred.
>
> MR. BRENNER: Because he harassed her. She complained about Rossbach's treatment of her to Eggert, Eggert didn't do anything ——
>
> THE COURT: Ask her. Ask her why she transferred and she can say, "Because I felt I was being sexually harassed," and then drop it.

III.

Some of the excluded testimony paralleled the findings of fact in *Smith, supra*. Hawkins claims these findings of fact should be afforded collateral-estoppel effect in here own lawsuit; that is, on remand, she asks that the defendants be precluded from offering evidence tending to disprove those findings. Collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery*, 439 U.S. at 326.

Because the Magistrate excluded the findings as irrelevant and unduly prejudicial, this issue was not addressed below. *Parklane Hosiery* grants trial courts broad discretion to determine when offensive collateral estoppel should be applied. *Id.* at 331. On remand the District Court should consider the offensive use of collateral estoppel, and determine whether it is appropriate in this case. We note that none of the circumstances justifying reluctance to allow the use of offensive collateral estoppel appears to be present here. Appellees urge that Hawkins could easily have joined in the previous litigation, a consideration disqualifying Hawkins from now urging estoppel. We are not so sure. The students brought a lawsuit over alleged sexual harassment at the Center. Hawkins claims she was retaliated against for complaining of sexual harassment at the Center. The lawsuits are related, but the Court would have been within its rights to exercise its discretion to deny Hawkins leave to intervene.

We reverse the judgments of the District Court and remand for further proceedings in accordance with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

LINDA J. HAWKINS,

Plaintiff,

v.

HENNEPIN TECHNICAL CENTER, JOINT INDEPENDENT SCHOOL DISCTRICT #287, ROGER LEE, Individually and in His Official Capacity as Director of HTC, ED FOLEY, Individually and in His Official Capacity as the Personnel Director of HTC, and RONALD M. CARTER, Individually and in His Official Capacity as Superintendent of District #287,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW and ORDER FOR JUDGMENT

CIV. NO. 4-87-196

At Duluth, in said District, this 8th day of May, 1989.

The above-titled action was fully tried before the undersigned United States Magistrate to whom it has been assigned in accordance with provisions of Title 28 U.S.C. § 636(c). Plaintiff, a former employee of Hennepin Technical Center, asserts claims of sex discrimination, and predicates her claims for relief upon provisions of Title 42 U.S.C. §1983; provisions of Title VII of the Civil Rights Act of 1964, *Title 42 U.S.C.* §2000e, *et. seq.*, and provisions of the Minnesota Human Rights Act, *Minn. Stat.* §*363.02(5), (6) and (7).* Jurisdiction over federal law claims was invoked pursuant to provisions of Title 23 U.S.C. §1331, and the Court exercised pendant jurisdiction over plaintiff's state law claims. All claims were consolidated into one trial. Plaintiff's Section 1983 claims were submitted to a jury, and the Title VII and Minnesota Human Rights Act claims were tried to the Court.[1] During the course of the tiral, plaintiff's Section 1983 claims against Ronald M. Carter were voluntarily dismissed, a verdict on those claims in favor of Roger Lee was directed, and the jury returned a verdict, in favor of Roger Lee was directed, and the jury returned a verdict in favor of all other defendants.

The Court has under consideration plaintiff's claims predicated upon Title VII and upon the Minnesota Human Rights Act. Upon all evidence adduced at trial, the arguments of counsel, and post-trial memoranda, now makes and enters its Findings of Fact and Conclusions of Law.[2]

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[1] *Cf., Title 42 U.S.C. §2000e-5(f) (4); Minn. Stats., 363.14, subd. 2; Lehman v. Nakshian, 453 U.S. 156, 164 (1981); Harmon v. May Broadcasting Co., 583 F.2d 410 (8th Cir. 1978).*

[2] It is not alway possible to draft an absolute finding of fact, and, for clarity, they are at times intermixed. Where a conclusion of law is included in findings of fact, or vice versa, the proper academic denomination should be applied. The form of this decision is, therefore, deemed to comply with Rule 52, Federal Rules of Civil Procedure.

Findings of Fact

1. Plaintiff Linda Hawkins (Hawkins) is a 43 year old female, and was employed by Hennepin Technical Center (HTC) from July 1, 1977 through June 30, 1982.

2. Joint Independent School District No. 287, also known as Hennepin Technical Center (HTC), a public educational institution, is comprised of a North Campus located in Brooklyn Park, Minnesota and a South Campus located in St. Louis Park, Minnesota.

3. Roger Lee was employed by HTC as Assistant Campus Director at the North Campus from 1972 to 1978, and has been Director of the North Campus from 1978 to 1988.

4. Ed Foley was employed by HTC as Personnel Director from 1978 to 1984 and has been Director of Human Resources since 1984.

5. Ronald M. Carter has been employed by HTC as Superintendent since July, 1982.

6. A council, generally identified as the Coop Council, composed of supervisors of various sections of the school, acted to coordinate activities of vocational programs, and made recommendations regarding staffing to the School Board, which has final decisionmaking responsibility and authority.

7. From July 1, 1975 through June 30, 1983, the terms and conditions of employment for the collective bargaining unit of which plaintiff was a member was established by a series of Master Contracts between HTC and the Co-operative School District No. 287 Federation of Teachers, Local 2209, American Federation of Teachers, AFL-CIO. The pertinent Master Contract for the 1981 through 1983 school years contained somewhat standard provisions which preserved, as a principle of employment, a seniority system which accorded certain privileges and benefits to employees on the basis of qualifications, certifications and length of service; defined qualified employee; required the School Board to maintain a recall list, upon which a laid-off employee would remain for three years unless he or she requested removal, and required HTC to recall employees, certified and qualified on the date of lay-off, from this recall list to fill vacancies;

provided bumping rights; included an anti-discrimination provision, contained a grievance procedure; and provided that initial placement on a salary schedule was negotiable.

8. In May, 1977, plaintiff applied for a position with HTC as a vocational counselor. The application which plaintiff submitted disclosed that she had received a BA degree, with a major in social welfare and a minor in psychology, in 1968, and a Master of Science in Education degree, with a major in school psychology and a minor in guidance, in 1977. Her relevant employment consisted of 16 months, in 1969 and 1970, as a caseworker for the St. Louis County Welfare Department, and for the immediately preceding 62 months, as a case manager-vocational counselor by the Minneapolis Rehabilitation Center. Her current salary was $13,800.00 annually. Plaintiff was not certified as a Vocational Counselor.

9. Plaintiff was interviewed by a number of supervisory employees. During the course of the interview by Ed Foley, he informed plaintiff of the starting salary for the position, and gave no indication that it was negotiable. The person responsible for establishing the salary offer was not disclosed.

On June 13, 1977, plaintiff was notified of approval of her appointment as a Counselor-CETA, contingent upon her obtaining the required certification as a Vocational Couselor.[3] This position was an off-campus position which involved working in the CETA program half-time and in secondary and post-secondary vocational programs half-time.

On June 20, 1977, plaintiff signed a Basic Teachers Probationary Contract as an Instructor/Counselor of CETA, beginning on or about July 1, 1977. The contract was for 48 weeks at a Step IV salary ($17,893.00 annually), and was contingent upon plaintiff obtaining certification as a Vocational Counselor.

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[3] HTC frequently hired persons who did not have the license required by the position if the person possessed qualifications for the license, with the understanding that employment was contingent upon the person applying and receiving the license.

10. Plaintiff completed a course in the Philosophy of Vocational Education, and was certified as a Vocational Counselor. On October 14, 1977, the parties executed an Amended Basic Teacher's Probationary Contract to coincide the starting date of her employment and the date that HTC was notified of her certification as a Vocational Counselor.[4]

11. During this time frame, four counselor positions were filled.

Richard Meintsma has received a BS degree, major in Social Studies and minors in History, Economics and Political Science, in 1952, and a Masters Degree in Counseling and Guidance in 1963. He had five years teaching experience, and has served four years as a Junior High School Principal, four years as a high school counselor, and seven years as a Coordinator of Pupil Personnel and Guidance for the Hopkins, Minnesota School District. He had been certified in Guidance and Counseling in 1972. Meintsma was hired at Step VII of the salary schedule ($20,396.00) for a 48 week term and assigned to the South Campus. Meintsma's salary from the Hopkins School District was $25,000.00 for a 42 week term.

Ray Schroeder has received a Bachelor's Degree, with a major in Science and a minor in Social Studies in 1961, and a Masters of Science Degree in Guidance and Counseling in 1969. He had 7½ years high school teaching experience, eight years counseling experience and was currently employed by the Brooklyn Center High School as a Counselor at a $20,390.00 salary for a 42 week term. Schroeder was not certified in Vocational Counseling, and his employment was contingent upon obtaining certification. The original Basic Teacher's Probationary Contract which Schroeder executed on June 20, 1977, showed a beginning date as on or about July 1, 1977. On September 29, 1977, this contract was amended to show the beginning date as on or about August 11, 1977, to reflect receipt of necessary certification. Schroeder was hired at Step VII of

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[4] A Vocational License in Guidance and Counseling was not formally issued to plaintiff until September 13, 1987.

the salary schedule and assigned to the North Campus.

Mary Albein received a Bachelor's Degree, major in Psychology, in 1970, and a Master of Science in Vocational Rehabilitation Counseling in 1972. Her relevant employment was Counselor Case Manager for the St. Paul and Minneapolis Rehabilitation Centers for about five years. Abelin was not certified, but was certifiable, and was hired, subject to obtaining a license, as a Counselor at Step IV of the salary schedule as assigned to the North Campus. Abelin had been earning $14,000.00 per annum.

Irma (Jeannie) Glessing received a Bachelor's Degree in Spanish in 1972, and a Master's Degree in Rehabilitation Counseling in 1975. She had worked for one year as a counselor and for 1½ years as Senior Vocational Rehabilitation Counselor with the Department of Vocational Rehabilitation. Her salary was $13,000.00 a year. Glessing was not certified, but was certifiable, and was hired as a counselor at Step IV of the salary schedule and assigned to the South Campus.

During the 1977-1978 school year, Louis Kressel, a female, was the highest paid counselor, and Robert Campbell, a male, was the lowest paid counselor.

12. In April, 1978, plaintiff expressed a preference for a position as an on-campus vocational counselor and requested a transfer from the CETA program. Early in April, 1978, an on-campus vocational counselor resigned, and Jim Rossbach, the Off-Campus Administrator, recommended plaintiff for the position.

At some point in time, Rossbach had received complaints concerning plaintiff's performance from coworkers. In September, 1978, Rossbach met with plaintiff in an attempt to resolve the problems. Plaintiff countered these complaints with complaints or criticism of Rossbach's treatment of female employees, and issues were not resolved.

On September 20, 1978, Foley informed plaintiff that her request for transfer had been approved, and that she would be transferred to the North Campus on a mutually agreeable date. On October 5, 1978, plaintiff entered into a new contract as an Instructor at a $20,073.00 per year salary.

13. On October 25, 1978, plaintiff was informed that her transfer would be effected on October 21, 1978, and that she would assume duties as a vocational counselor on January 4, 1979. In the interim, plaintiff was temporarily assigned to the District Office.

14. In the latter part of 1980, plaintiff became involved in counseling a female student who had complained of sexual harassment by an instructor in the dental lab. Plaintiff spent considerable time with this student, commenced monitoring the dental lab, and, in early 1981, informed Jane Vare, the head of the Health Occupations Section, the instructor's supervisor, of the student's complaints and met with Vare on several occasions. Early in 1981, plaintiff informed Marty Patterson, Department Supervisor for Student Support Services, of the sexual harassment problem.

15. On February 10, 1981, and on at least one other occasion, Patterson met with plaintiff to discuss work related problems and concerns; including the excessive time that she took for breaks and lunch, her relations with other counselors, her failure to assume a proportionate share of walk-ins, her contact with students, a possible transfer to the Vocational Assessment Center, the excessive time that she was spending with one student in personal counseling, and her lack of effort in recruiting. During these not always cordial discussions, plaintiff indicated that her particular skills and knowledge were not extensively utilized in her present role. The complaints and plaintiff's responses were reduced to writing, and, although some meetings became stormy, matters seemed to be resolved without personal rancor. On at least one occasion, Patterson informed plaintiff that the problem with female students in the dental lab was being handled by the administration and that she was not to continue her involvement.

16. In late February or in March, 1981, a meeting of all department supervisors was held to, among other things, review student enrollment and attrition. Counselors were invited to express their views regarding student attrition. Plaintiff opined that students were leaving because of the problems in the dental lab section, and again broached the

subject of sexual harassment of the student with whom she had been counseling. Plaintiff was again informed that this was a matter to be addressed by the administration, and not a matter in which she should be involved.

With full knowledge of disapproval by her superiors, plaintiff continued to counsel the student and continued to monitor the dental lab.

17. During this period of time, Diane Benson, another vocational counselor, had also transmitted complaints of sexual harassment to the adminstration. There is no evidence that Benson was transferred, laid-off or suffered retaliation of any kind for her actions.

18. Staffing projections for the 1981-1982 school year decreased support staff and eliminated one couselor at both campuses. Lay-offs were governed by seniority, but, for some reason, HTC had difficulty in establishing an accurate seniority list. Successive seniority lists amending and altering the order of seniority were compiled resulting in understandable confusion. This is not of great materiality. Actual seniority is determinative.

19. During this time frame, Gerald Murray, the South Campus Support Services Manager, resigned to participate in the development of a vocational assessment center. Plaintiff was notified that, effective July 1, 1981, she would be transferred to the position vacated by Murray, and that, to qualify, she should apply for a license as Support Services Manager. On July 1, 1981, plaintiff obtained a license as Support Services Manager, and the transfer was effected.

20. On January 14, 1982, the Executive Committee for the School District, in reaction to decreased enrollment, adopted a resolution directing the administration to make recommendations for reductions in progress and positions. The Executive Committee recommended that 57 positions requiring licenses be discontinued. These positions included six Support Service Managers, two Vocational Advisors, and three Counselors.

21. On February 23, 1982, plaintiff inquired regarding the 1981-1982 seniority list and her seniority in relation to that of Ray Schroeder and Stephanie Corbey.

On March 23, 1982, the Personnel Department, rather confusingly, informed plaintiff that her seniority date had been adjusted to July 1, 1977, the date that she commenced employment as a Consultant/Substitute, that her initial employment contract was dated October 14, 1977, and that her date of licensure was August 26, 1977. Schroeder's initial contract was shown to be August 17, 1977, and that date of his license at August 11, 1977. Corbey's initial contract was shown to be September 29, 1977, her employment as commencing on August 15, 1977, and her license as dated September 28, 1977.

As a matter of fact, plaintiff's seniority as a vocational counselor is figured from August 26, 1977, Schroeder's from August 11, 1977, and Corbey's from September 23, 1977.

22. On August 15, 1982, plaintiff was informed that, due to discontinuance of position, lack of students and financial limitations, the Board had adopted a resolution proposing her placement on unrequested leave of absence effective at the end of the 1981-1982 school year.

23. The position which Corbey held served handicapped students, and, under state regulations a Special Education license was required. Corbey has less seniority, but was fully certified for the position and was retained in that position. Plaintiff filed a grievance asserting bumping rights against Corbey.

24. The Union contract provided that seniority and qualifications would be determining factors in lay-off and recall, that qualified employees shall be laid-off in inverse order of seniority, and that a tenured employee facing lay-off could bump a less senior employee in a different area if she was licensed and qualified, but that bumping could be effected only if the required license was on file in the HTC Personnel Office by January 1 of each year. A qualified employee was defined as one who, in addition to the state license, has a major or had experience in the subject matter of the field and has on file in the Personnel Office documentation showing a minimum of nine consecutive months of full-time experience in the subject area within the last five years.

25. On April 23, 1982, a hearing on plaintiff's grievance was conducted. The grievance was denied upon findings that plaintiff did not have the required Special Education license, and, that, on January 1, 1982, plaintiff did not have documentation of nine consecutive months of teaching experience in the subject area on file.

26. In May, 1982, HTC posted notice of openings for positions, in the newly implemented Vocational Assessment Center, as vocational evaluators, requiring a license as a vocational evaluator; as Vocational Assessment Counselor, requiring license as a Support Service Manager and a standard license in a field of Special Education; and as Evaluation Technicians, requiring vocational license as a Supplemental Support Staff/Technical Tutor.

27. On May 17, 1982, plaintiff requested consideration for a position as Vocational Evaluator or for any position for which she would be qualified by license or provisionally. At this time, plaintiff was not certified as a Vocational Evaluator, or as a Supplemental Support Staff/Technical Tutor, and did not have a license, or qualifications for a license, in a special education.

Applicants for these positions were first considered by a screening committee which referred selected applicants to an interview committee for further consideration. The screening committee determined that plaintiff was not qualified as a Vocational Assessment Counselor or Evaluation Technician, and did not recommend plaintiff to the interview committee. She was not seriously considered for any open position.

Prior to that time, John Lobben, the Director of Vocational Occupational Education had asked plaintiff to update here experience and licensing data on file, and had discussed positions which would be open in Vocational Assessment Center. Plaintiff expressed disinterest in the paraprofessional Vocational Evaluator position and withdrew here candidacy.

28. On June 24, 1982, plaintiff, along with 29 ohter employees, eight women and 21 men, were placed upon unrequested leave of absence. Four Support Service

Managers were given lay-off notices and two open positions were to remain unfilled, so, in effect, six Support Service Manager positions would be eliminated. Resignations, transfers and other adjustments ultimately resulted in retention of all vocational counselors and the lay-off of only one Support Service Manager.

29. On May 18, 1983, HTC announced the opening for a Program Information Specialist, which required certification in Student Support Services and a license as a Student Personnel Service Specialist.

30. On June 28, 1983, after receiving notification that Lavonne A. Carr had been certified as a Student Personnel Services Specialist, the School Board withdrew the proposed placement of Carr upon unrequested leave of absence, and placed her in the Program Information Specialist position.

31. On May 20, 1985, a position as Counselor at the South Campus opened, but, concluding that her recall rights had expired, HTC did not recall plaintiff for this position.

32. Plaintiff's recall rights expired at the end of the 1984-1985 school year, June 30, 1985.

Conclusions of Law

Plaintiff predicates her action upon provisions of both federal and state law. The purpose of these statutes, and their language, is virtually identical, and Minnesota courts look to principles developed by federal courts in Title VII cases in resolving claims arising under the Minnesota Human Rights Act. *See Sigurdson v. Isanti County, 386 NW.2d 715, 719 (Minn. 1986); Hubbard v. United Press Int'l., Inc., 330 NW.2d 428, 441, (Minn. 1983); Danz v. Jones, 263 NW.2d 395, 398-99 (Minn. 1978);* cf., *Kovalevsky v. West Pub. Co., 674 F. Supp. 1379, 1385 (Minn. 1987).* Unlawful discrimination in employment is an ultimate question of fact, *see, United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716 (1983),* and, as in all civil litigation, plaintiff has the burden of proving this ultimate fact by a preponderance of the evidence. *See, Herman & Maclean v. Huddleston, 459 U.S 375, 390 (1983); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 29*

(1978), (Stevens, J., dissenting). The statutes make unlawful certain employment practices which are adverse to an employee because of his or her sex. The test applied, regardless of how phrased is, essentially, the "but for" test common to tort actions. Therefore, plaintiff has the burden or proving, by a preponderance of the evidence, that her sex was considered and became a motivating factor in the employment decisions of which she now complains. *Cf., Danzl v. North St. Paul-Maplewood-Oakdale Independent School District, 706 F.2d 813 (8th Cir. 1983).*

There are two types of conduct upon which a sex discrimination in employment case can be predicated - disparate treatment and disparate impact.[5] Employment practices constitute disparate treatment if they intentionally take into account an employee's race, national origin, sex or religion. Disparate impact results from an employment practice which, though facially neutral, has a disproportionate adverse effect upon employees of a particular race, national origin, sex or religion, which is not justified by bona fide occupational qualifications. An employment practice can produce disparate impact even if not intentionally discriminatory. The theories of recovery have differing elements, and require different legal analysis. Plaintiff's claim is that she received unfavorable treatment in employment because she was female. This is a disparate treatment claim, and the analytic framework constructed in *McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973),* will be utilized. *See, also, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Sigurdson v. Isanti*

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[5] *Cf., International Brotherhood of Teamsters v. Unites States, 431 U.S. 324, 335 n. 15 (1977); Sigurdson v. Isanti County, 386 NW.2d 715, 719 n. 1 (Minn. 1986).*

County, supra at 719-20. The analysis proceeds in three step sequence.[6]

First, plaintiff must carry the burden of proving a prima facie case of discrimination by establishing facts sufficient to give rise to an inference of sex discrimination. *Texas Department of Community Affairs v. Burdine, supra at 252-53; O'Connor v. Peru State College, 781 F.2d 632, 636 (8th Cir. 1986); Sigurdson v. Insanti County, supra.* Plaintiff's claim has several facets, i.e.:

a. that she was descriminated against in setting her rate of pay,

b. that her transfer to the South Campus as Student Service Manager was discriminatory,

c. that she was discriminated against in her lay-off in 1982,

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[6] During the time that this decision was in stages of preparation, this Court learned that the Supreme Court was reviewing *Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), cert. granted,* ___ U.S. ___, *108 S.Ct. 1106 (1988),* and that there was a likelihood that a split of authority among lower courts pertaining to burden of proof in Title VII cases would be clarified. On May 1, 1989, the Court entered that opinion. *See, 1989 WL 40807 (U.S.).* Despite disclaimer by the majority, it appears that, as a practical matter, the opinion does signal a departure from the prevailing understanding of the teaching of *McDonnell-Douglas v. Green, and its progeny.* Whether it clarifies or simplifies matters for litigants and trial courts or, in the words of Justice Kennedy:

> ". . . the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion."

(Kennedy, J., dissenting, joined by Rehnquist, C.J. and Scalia, J.)

only time will tell. Regardless, it appears that his Court waited in vain. The teaching of *Price Waterhouse* is applicable only to mixed motive cases; i.e., cases in which plaintiff has proven by direct evidence that an unlawful motive was one substantial factor actually relied upon by the employer in making an employment decision. Plaintiff has not offered any direct evidence of sexual animus coloring the employment decisions of which she complains. This is not a mixed motive case. *Price Waterhouse* is inapposite, and an exhaustive analysis of that opinion is not necessary.

d. that her denial of bumping rights at the time of her lay-off was discriminatory,

e. that she was discriminated against by failure to recall her after her lay-off,

f. that some or all of these discriminatory acts were in retaliation for her complaints and actions regarding sexual harassment of a female student or for filing an EEOC complaint.

Succinctly stated, to establish a prima facie case of discrimination, plaintiff was obligated to produce evidence to prove that she was a member of a protected class and was subjected to unfavorable employment conditions or decisions which one can reasonably infer were intentionally based upon her sex. To establish a prima facie case of retaliation, plaintiff was obligated to produce evidence from which one can infer that she was subjected to adverse employment decisions because she had engaged in activity which is protected by statute.

If plaintiff establishes a prima facie case, the second step in the sequential procedure requires defendants to assume the burden of going forward with the evidence, and to articulate a legitimate, non-discriminatory reason for the employment decisions in question which is sufficient to dispel the inference of discrimination. *McDonnell-Douglas Corp. v. Green, supra at 802; Texas Department of Community Affairs v. Burdine, supra at 254; Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978); O'Connor v. Peru State College, supra at 636; Sigurdson v. Isanti County, supra at 720.*

If defendants carry this burden of production, the third step of the sequence requires plaintiff to prove that the reasons proffered by defendants were in fact pretext and that a defendant intentionally acted with a discriminatory motive. *Texas Department of Community Affairs v. Burdine, supra at 256; McDonnell-Douglas Corp. v. Green, supra at 804; Griffin v. City of Omaha, 785 F.2d 620, 625 (8th Cir. 1986); Sigurdson v. Isanti County, supra at 720.* Plaintiff can meet this burden of proving the ultimate fact directly,

by persuading the trier of fact that a discriminatory motive more likely than not was a factor, or indirectly, by a showing that the employer's proffered reasons for the decision are unworthy of credence. *Texas Department of Community Affairs v. Burdine, supra at 256.*

This format controls the decisionmaking process, but does not, as a practical matter, appreciably alter the ordinary course of a trial, nor does it shift the burden of proof. The burden of production of evidence imposed by Steps 1 and 2 are light, and easily carried. Most cases are resolved by determination of the pretext issue. *Cf., McDonald v. Santa Fe Rail Transp. Co., 427 U.S. 273, 282 n. 10 (1976).* In this respect, the court is not obligated to make specific findings on all evidence presented, but must express reasons for rejecting evidence introduced to support a claim of pretext. *See, Tuttle v. Henry J. Kaiser Company, 863 F.2d 601, 602, (8th Cir. 1988).* This Court has attempted to fulfill this obligation with respect to affirmative evidence offered by plaintiff on this issue.

It should be noted, that, in the ordinary case, the claims against each of the defendants, and their individual defenses, should be separately and independently considered. All individual defendants were not involved in all of the pertinent employment decisions, and plaintiff did not clearly delineate which claims were asserted against which defendants. The Court could, after its blanket review, again sift the evidence and determine some of the claims against some of the defendants on the basis of failure of proof of involvement of that individual defendant in an employment decision. In view of its determination, this Court forgoes what it perceives to be, as a practical matter, a non-productive exercise.

II.

Evidence that plaintiff's starting salary was less than that of males hired at about the same time, albeit for different positions, is sufficient to establish a prima facie case in this regard, but evidence pertaining to her transfer to the South Campus as a Support Service Manager, her

lay-off, denial of bumping rights and failure to recall provide little meaningful support for her claim. These employment decisions may have been, in the abstract, unfavorable. An inference of unlawful sex discrimination, however, cannot be drawn from the employment decisions in the abstract. The inference must be derived from the totality of circumstances, and must find support in evidence which indicates that a comparable member of a non-protected class was afforded more favorable treatment in the same or like circumstances. *Cf. McDonnell-Douglas Corp. v. Green, supra at 802.* In this regard, there is a dearth of evidence pertaining to the bulk of plaintiff's claims. Nevertheless, this Court, for ease of disposition, will consider a prima facie case established on all of plaintiff's claims, and will determine each of the claims by resolution of the pretext issue.

III.

Plaintiff's first claim involves her starting pay. during July, 1977, HTC entered into agreements for employment of Meintsma, Schroeder, Abelin and Glessing, as Vocational Counselors, and for employment of plaintiff as Instructor/Counselor in the CETA program. Arguendo, we can assume that the positions are comparable. Starting pay for the two men hired was at Step VII of the salary scale ($20,396.00), and the starting pay for the three women was at Step IV ($17,893.00). Defendants justify the differential in starting pay on the basis of the respective qualifications of the five persons and marketplace considerations.

Meintsma and Schroeder had far more extensive teaching and counseling experience, after obtaining Master's Degrees, than plaintiff and the other women hired. This experience was directly related to the duties of the counseling position for which they were hired; and was unique; both had acted as liaison counselors between a public high school and HTC. In contrast, plaintiff had no experience teaching or counseling in a public school, did not have a vocational counselor's license, and had no work experience after

receiving her Master's Degree.

An employer is free to consider education, experience, and other factors pertaining to an employee's qualifications for a particular job in setting a starting salary. *See, EEOC v. Aetna Insurance Co., 616 F.2d 719 (4th Cir. 1980); Herman v. Roosevelt Federal Savings & Loan Ass'n., 432 F. Supp. 843 (Mo. 1977), aff'd, 569 F.2d 1033 (8th Cir. 1978); Dunlop v. General Electric Co., 401 F. Supp. 1353 (Va. 1975).* Fixing an employee's starting salary within a range of previous earnings, or at a figure which the employee could demand elsewhere, is a recognition of reality. The starting salaries for each of the five persons hired was, more or less, a reflection of worth in the real world labor market. Both of the men hired suffered a cut in pay, in effect. The three women hired, on the other hand, realized an increase in pay. In a sense, the males received unfavorable treatment, but a starting salary established with an eye to the marketplace usually demonstrates managerial skill, and does not, without more, carry a stigma of discrimination. *Cf., Bohm v. L. B. Hartz Wholesale Corp., 370 NW.2d 901 (Minn. App. 1985).* There is no evidence from which one can infer that HTC, as a matter of policy or practice, discriminated against women by establishing starting salaries for males at a higher step in the salary scale than the starting salaries set for females of comparable qualifications hired for comparable positions. Defendants have articulated legitimate, non-discriminatory reasons for starting plaintiff at Step IV of the salary scale and for starting Meintsma and Schroeder at Step VII. Plaintiff has not shown that these reasons were mere pretext, and has failed to produce evidence which proves, by a preponderance of the evidence, that defendants discriminated against her, on the basis of her sex, in establishing her starting salary.

IV.

Plaintiff's second claim arises from her transfer, on July 1, 1981, from a position as a Vocational Counselor at the North Campus to a position as a Support Service Manager at the South Campus, subject to her obtaining the proper

license. Defendants contend that plaintiff's transfer to a different job at a different location was an alternative to lay-off, and was in conformance with the HTC philosophy of attempting to maintain student support services in both campuses on an equal basis.

Financial projections for the school year of 1981-1982 clearly indicated that, in all likelihood, one vocational counselor position would be discontinued. Plaintiff was least senior of the vocational counselors and would have been the first laid-off. Prior to July, 1981, there were four vocational counselors stationed at the North Campus and five stationed at the South Campus. At about that time, the senior vocational counselor at the South Campus transferred to the North Campus. HTC has a policy or practice of providing student support services on an equal basis on the two campuses, when circumstances permit. Elimination of one vocational counselor at the North Campus would achieve a 4-4 balance.

There is no evidence from which one could reasonably infer that defendants did not believe that the projected reduction in funding for HTC would create a high probability that a vocational counselor position would be eliminated and that plaintiff would face lay-off, or that the transfer was not a sincere effort to preserve plaintiff's employment at HTC. As a result of the employment decision, plaintiff continued her employment in a position for which she was trained and became qualified, one vocational counselor position for which she was trained and became qualified, one vocational counselor position was eliminated to accommodate the budget crunch, and eliminating one position and transferring a counselor to the North Campus achieved balance in student support services between campuses.

Defendants have articulated a legitimate, non-descriminatory reason for plaintiff's transfer, plaintiff has not produced evidence which persuades this Court that these reasons were mere pretext, and has failed to prove, by a preponderance of the evidence, that defendants discriminated against her on the basis of her sex in

transferring her to a Support Service Manager position on the South Campus in July, 1981.

V.

Plaintiff's third claim arises from her placement upon unrequested leave of absence effective June 30, 1982. Defendants contend that the lay-off of Support Service Managers for the ensuing school year was selected for lay-off in accordance with the controlling provisions of the Union contract.

The School Board directed HTC to eliminate six Support Service Managers at the end of the 1981-1982 school year. Plaintiff's seniority is properly computed from the date upon which she was licensed as a vocational counselor, and, in 1982, she was the least senior vocational counselor possessing all qualifications for available vocational counselor positions. In an attempt to prove that the reasons proffered by defendants are pretextual, plaintiff contends that the School Board or HTC Administration could have provided funds for a Support Service Manager by allocating less money to some other program or function, and that her transfer in 1981 was purposeful in anticipation of reduction in the number of Support Service Managers in 1982. She produced no concrete evidence in support of these contentions. The second contention is pure conjecture, and the first ignores control over the allocation of funds for student support services exerted by the state. Even if HTC has power to control allocation of funds, as plaintiff contends, the record is devoid of any evidence from which one could infer that the School Board and the Administration, in allocating funds, abdicated duty, obligation and responsibility to students and to the institution, and adjusted the budget to target plaintiff for lay-off because of her sex. This Court is persuaded by the evidence that the placement of plaintiff on unrequested leave of absence was precipitated by genuine financial dictates, was in conformance with the seniority system established by the Union contract, and that adherence to the seniority system was proper under

controlling law. *Cf., Fire Fighters Local No. 1784 v. Stots., 467 U.S. 561 (1984); Title 42 U.S.C.* §2000e-2(h); *Bohm v. L. B. Hartz Wholesale Corp., 370 NW.2d 901, 906 (Minn. App. 1985).*

Defendants have articulated legitimate non-descriminatory reasons for plaintiff being placed on unrequested leave of absence in June, 1982. The circumstances disclosed by the evidence lend credence to these reasons, and plaintiff has not pursuaded this Court, by the weight of the evidence, that the reasons proffered were mere pretext, and that defendants discriminated against her on the basis of her sex.

VI.

Plaintiff's next claim arises from the denial of bumping rights against Stephanie Corbey at the time of plaintiff's lay-off in June, 1982. The position required a license in Special Education. Corbey was licensed and qualified for the position. Plaintiff was not. Bumping rights may be invoked only by an employee licensed and qualified for the position with documentation of required experience on file on the preceding January 1. Defendants aver that plaintiff was denied bumping rights against Corbey because she failed to satisfy bumping licensing and experience prerequisites. The record supports this position. As a further observation, there is inborn weakness in plaintiff's claim that she was intentionally discriminated against because of her sex by denial of bumping rights against a person of the same sex.

Defendants have articulated a legitimate non-descriminatory reason for denying plaintiff bumping rights to the position occupied by Stephanie Corbey. Plaintiff has not shown that said reason was pretext, and has not proven, by the preponderance of the evidence, that she was a victim of intentional sex discrimination.

VII.

Plaintiff's next claim involves her right to be recalled to an open position. Plaintiff preserved recall rights to positions

requiring a vocational counselor or a support service manager license until the end of June, 1985. Prior to expiration of her recall rights, the newly organized Vocational Assessment Service Center was staffed, positions of Vocational Evaluator, Vocational Assessment Counselor and Evaluation Technician were filled, and a Program Information Specialist was hired in the Student Personnel Services Department. Plaintiff claims that she had a right to be recalled to fill any of these positions, and that the failure to recall her was an intentional act of sex discrimination. The Union contract provides that an employee on the recall list shall be recalled to fill vacancies in any position for which the employee was licensed and qualified at the time of the lay-off. Defendants contend that plaintiff was not recalled to fill an open position because she was not licensed and qualified. In June, 1982, plaintiff was licensed in Guidance and Counseling, as a Vocational Counselor and as a Support Service Manager. There is evidence that plaintiff expressed disinterest in the para-professional Evaluation Technician position, but, regardless, plaintiff did not have license as a Supplemental Support Staff/Technical Tutor, in any field of special education, as a Vocational Evaluator, or as a Student Personnel Service Specialist. The record supports defendants' contention that plaintiff was not recalled on the basis of lack of qualifications, and plaintiff has not shown that this reason was pretextual. Plaintiff has failed to prove that defendants intentionally discriminated against her on the basis of her sex in failing to recall her to fill a vacant position prior to June 30, 1985.

VIII.

Finally, plaintiff claims that the acts or actions of defendants upon which she predicates her sex descrimination claims were in retaliation for forcefully advocating the rights of a female student being sexually harassed by a dental lab instructor, and, later, in retaliation for the exercise of her personal right to file a complaint with the EEOC alleging sex discrimination.

Section 2000e-3(a) of Title VII provides that discrimination by an employer against an employee because the employee has opposed a practice made an unlawful employment practice by Title VII, or because the employee has made a charge under Title VII, is an unlawful employment practice. The three-part analytic format developed in *McDonnell-Douglas v. Green* is appropriately utilized in determining a retaliation claim. *Cf., Hubbard v. United Press Int'l., Inc., 330 NW.2d 428, 444 (Minn. 1983).* To establish a prima facie case, a plaintiff must establish the three elements of the offense:

1. that plaintiff engaged in protected conduct by opposing an unlawful employment practice or by filing a charge under Title VII;

2. that, thereafter, plaintiff's employer's acts or action adversely affected her employment; and

3. that the employer acted because plaintiff had engaged in protected conduct.

In this case, proof of the first two elements posed little difficulty. Plaintiff's opposition to sexual harassment of another person was protected conduct. *See, cf., EEOC v. St. Anne's Hospital of Chicago, 664 F.2d 128 (7th Cir. 1981); Gifford v. Atchinson, Topeka & Santa Fe Ry. Co., 685 F.2d 1149 (9th Cir. 1982); Novotny v. Great Am. Sav. & Loan Assn., 584 F.2d 1235 (3rd Cir. 1978), rev'd. o/grounds, 442 U.S. 366 (1979).* Proof that an employee's conduct was protected does not incorporate proof that employment practices opposed were in fact unlawful. A good faith belief of illegality is sufficient. *Cf., Wentz v. Maryland Casualty Company, 869 F.2d 1153 (8th Cir. 1989).* Plaintiff's interest in opposing isolated sexual harassment is not as weighty as an employee's interest in opposing deep-rooted and pervasive discrimination, but is sufficient to satisfy the opposition branch of the statute. Similarly, filing an EEOC charge is protected conduct. The merits of the charge are immaterial. *Cf., Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969), reh'g. den., 415 F.2d 1376 (5th Cir. 1969).*

That employment decisions, adverse to plaintiff's interests, ensured cannot be gainsaid.[7]

The crucial issue on the retaliation claim is causation, and the issue can be succinctly phrased. Plaintiff has the burden of proving, by a preponderance of the evidence, that her engagement in protected conduct was a determining factor for allegedly retaliatory acts. *Cf., Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985); Williams v. Boorstin, 663 F.2d 109 (D.C. Cir. 1980), cert. den., 451 U.S. 935 (1981).* Put another way, plaintiff has the burden of proving by a preponderance of the evidence that the employment decisions would not have been made "but for" her exercising rights afforded by Title VII or the state law. *Cf., Wentz v. Maryland Casualty Company, supra, (Wohlman, J., concurring).*

All of the employment decisions of which plaintiff complains can be considered in determining the claim of retaliation for plaintiff's opposition to sexual harassment of the student, but only the employment decisions made after November 23, 1982, the date of plaintiff's EEOC complaint, are relevant to the claim of retaliation for filing that Complaint. The Court, however, has remained cognizant of the interrelationship of the two facets of protected conduct in which plaintiff engaged, and has focused upon factors critical to an inference of retaliation for either, or the combination.

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[7] This Court feels it advisable to add a comment. This case is colored by an unsavory history of sexual harassment of female students by a dental lab instructor. This unlawful sexual harassment, and plaintiff's good faith in efforts to bring the matter to the attention of the administration, were not at issue. The scope and breadth of the trial were clearly delineated by rulings on motions in limine and rulings during the course of trial. Orderly presentation of evidence was repeatedly disrupted by counsel for plaintiff's defiance, and his attempts to introduce immaterial and inflammatory evidence of the details of sexual harassment of the student, or others, in spite of the Court's clear indication that it would not engage in litigating a non-issue.

The chronological relation between an employer's knowledge of plaintiff's protected activity and subsequent adverse employment decisions is enlightening. A narrow time frame lends support to an inference of causal connection. *See, Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980), cert. den., 450 U.S. 979 (1981); Hicks v. ABT Assoc., 572 F.2d 960 (3d Cir. 1978).* Plaintiff counseled the student and expressed her opposition to sexual harassment for a period extending form late Fall in 1980 to early Spring in 1981. The actions which plaintiff claims were in retaliation for her opposition to sexual harassment of a student occurred in July, 1981 and June, 1982. The actions which plaintiff claims were in retaliation for filing an EEOC Complaint, and probably a continuance of retaliation for opposition to sexual harassment of the student, occurred in the early months of 1983 and, presumably, continued until June 30, 1985. One can infer that retaliatory acts were spread across this four year period, but the inference is weak.

Claimed unequal treatment must be examined to determine if employees similarly situated who did not engage in protected conduct were more favorably treated, and if the treatment afforded plaintiff changed appreciably after she engaged in protected conduct. *Cf., Tuttle v. Henry J. Kaiser Company, supra; Barela v. United Nuclear Corp., 462 F.2d 149 (10th Cir. 1972).* This Court cannot find evidence to support a conclusion that plaintiff's engagement in protected conduct caused a change in the employer's attitude towards her, or which demonstrate that she was treated differently than she had been, nor has she produced any evidence which establishes that other employees similarly situated were, in other instances, treated more favorably without valid and legitimate reason.

Evidence of the employer's retaliation against other employees who had engaged in similar conduct can provide support for an inference of retaliation. *See, EEOC v. Operating Engineers, Locals 14 & 15, 438 F. Supp. 876 (NY 1977).* The record has been perused with an eye to determining whether or not a pattern or practice of

retaliation can be discerned. Plaintiff produced evidence in an attempt to show that other employees whose conduct, in some respect, met with defendants disapproval were subjected to reprisals. This evidence must be examined.

Nancy Paulson, a former student, testified that after complaining of sexual harassment in the dental lab she was issued a disciplinary notice for violation of smoking regulations, and there is no evidence conducive of a finding that she was treated differently after making complaints or differently from students who had not made complaints. Paulson had an obligation to abide by the rules, and the school administrators had a duty to enforce rules with an even hand. Disciplining a repeat offender does not raise the spectre of retaliation.

Joanne Trader, the female student who had been sexually harassed, testified that after complaining, her on-campus activity was more closely monitored, that her permit to park in a handicapped parking zone was revoked, and that she, thereafter, received parking tickets for parking in the handicapped parking zone. Trader completed her course at HTC and left after graduating. Trader did not relate incidents, occurrences or practices which support her conclusion that her on-campus conduct was monitored to any unusual degree. The evidence does establish that the disability from which she had suffered had ameliorated to the extent that she was able to engage in strenuous sports, that she lost eligibility for consideration as a handicapped person, that her handicapped parking permit was revoked with good cause, and that after its revocation she knowingly violated parking regulations. Trader was treated no differently than any other student, and an inference of retaliation is not warranted.[8]

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[8]There is evidence that the instructor against whom she levied complaints may have engaged in acts or actions which could be seen as retaliatory. There is no evidence to support a finding that any of the defendants were put on notice of these acts or actions, and neither their liability nor a pattern and practice can be predicated upon something of which they did not have knowledge.

Dennis Knapp, a former instructor, testified that he had complained of sexual harassment of students in 1979. He resigned in 1982, but held himself open to call as a temporary substitute teacher. He was called for temporary work on several occasions, but, with increasing frequency, refused assignments because he was busy or otherwise engaged. He claimed that HTC ceased calling him in retaliation for the 1979 complaints. HTC claims it did not continue to call him because of his unavailability. In the light of his employment from 1979 to 1982, without incidents which he claimed were retaliatory, and his recall during the time that he remained available, this Court finds his claim far less credible than HTC's explanation and gives it no weight.

Brigette Adams, a former instructor in the dental lab, was, in 1982, the least senior instructor, and was laid-off. On at least one occasion, she was called to fill-in temporarily for an instructor during his illness. In November, 1982, Adams returned to the campus, and, while visiting in the dental lab, was ordered to leave by Lee. She testified that her lay-off, the order to leave the campus, and failure to recall her were in retaliation for complaints of sexual harassment by the dental lab instructor commencing in 1980. The evidence established that Adams worked for two years after her complaints, and was laid-off in accordance with the seniority system; and that her presence in the dental lab was unauthorized. There is no evidence that an opening occured in any position for which Adams was certified and qualified, that her former position was filled, or that she had properly preserved recall rights. This Court finds that the circumstances upon which Adams bases her contention do not support an inference of a practice or pattern of retaliation.

Helen Jirak was formerly employed in the CETA program. In 1978, she obtained other employment and resigned. A few months later she tried to revoke her resignation and return to work. HTC informed her that her employment had been terminated, and another person had been hired, on a part-time basis, to assume duties which she had performed.

She reported for work, HTC rejected her offer to return, and she informed someone in charge that HTC would hear from her lawyer. Jirak filed a grievance, claiming that the failure of HTC to notify her that her resignation had been accepted permitted her to revoke her resignation and reclaim her position. The grievance was denied by HTC, and not pursued. Jirak testified that, in spite of her assertion of alleged rights, she had no desire to return to work at HTC. This episode has curious aspects, and Jirak's motivation is subject to interesting speculation in which this Court need not indulge. Nothing in her testimony indicates that her resignation was prompted by sex discrimination and nothing supports an inference of retaliation or of a practice of retaliation against employees complaining of sexual harassment.

In each of the instances utilized by plaintiff to support the claim of retaliation, the record discloses that the action by HTC was supported by legitimate non-discriminatory cause. The evidence offered did not raise an inference of a practice or pattern or retaliation against employees who called perceived deficiencies in supervision or administration to the attention of administrative officers.

Finally, the manner and means by which plaintiff expressed opposition to the sexual harassment of the student has been considered. Legitimate opposition to an unlawful employment practice may be manifested in a manner which creates personal conflicts between the employee and supervisors or with the duties to which the employee is assigned. A gestalt approach to determination of an employer's motivation is of practical value. *Cf., Rosser v. Laborer's Int'l. Union, Local 438, 616 F.2d 221 (5th Cir. 1980), cert. den., 449 U.S. 886 (1980); Jefferies v. Harris County Comm. Action Assn., 615 F.2d 1025 (5th Cir. 1980).* If conflicts have arisen which abase an employee's performance or ability to function as an integral cooperative part of the organization, an inference of retaliation is weakened. After plaintiff was informed that the student's problem would be handled by the administration, and that she should desist activity in that regard, she continued to

spend a great deal of time with the student and continued monitoring the dental lab. This disregard of authority created personal conflict with her superiors, and the expenditure of time in unauthorized activity was at the expense of time which should have been devoted to duties and resulted in expressions of dissatisfaction by coworkers. Plaintiff's conduct could reasonably cause superiors to look upon an employee of either sex with some disfavor.

All circumstances considered, the evidence dispels any inference that plaintiff's engagement in protected activity was determining factor in the employment decision. Plaintiff has failed to establish causation which is an essential element of prima facie case of retaliation.

IX.

The Court further notes that, even if an inference of retaliatory action could be drawn to establish a prima facie case, defendants have articulated a legitimate non-descriminatory reason for all employment decisions of which plaintiff complains. Plaintiff has not proven them to be mere pretext. This is sufficient to defeat plaintiff's retaliation claim.

WHEREFORE, It is -
ORDERED:

1. That plaintiff take nothing upon claims advanced in this action, and that defendants have judgment together with costs and disbursements.
2. That the Clerk of the Court enter judgment accordingly.

BY THE COURT:

/s/

Patrick J. NcNulty
UNITED STATES
MAGISTRATE

Rule 401.

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402.

Relevant Evidence Generally Admissible: Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403.

Exclusion of Relevant Evidence on Ground of Prejudice, Confusion or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

§2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful practice for any employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has apposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

363.03 Unfair Discriminatory Practices.

Subdivision 1. **Employment.** Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(1) For a labor organization, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or age,

(a) to deny full and equal membership rights to a person seeking membership or to a member;

(b) to expel a member from membership;

(c) to discriminate against a person seeking membership or a member with respect to his hire, apprenticeship, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment; or

(d) to fail to classify properly, or refer for employment or otherwise to discriminate against a person or member.

(2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, or age,

(a) to refuse to hire or to maintain a system or employment which unreasonably excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities or privileges of employment.

(3) For an employment agency, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or age,

(a) to refuse or fail to accept, register, classify properly, or refer for employment or otherwise to discriminate against a person; or

(b) to comply with a request from an employer for referral of applicants for employment if the request indicates directly or indirectly that the employer fails to comply with the provisions of this chapter.

(4) For an employer, employment agency, or labor organization, before a person is employed by an employer or admitted to membership in a labor organization, to

(a) require the person to furnish information that pertains to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance or disability, unless, for the purpose of national security, information pertaining to national origin is required by the United States, this state or a political subdivision or agency of the United States or this state, or for the purpose of compliance with the public contracts act or any rule, regulation or laws of the United States or of this state requiring information pertaining to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance or disability is required by the United States or a political subdivision or agency of the United States; or

(b) cause to be printed or published a notice or advertisement that relates to employment or membership and discloses a preference, limitation, specification, or discrimination based on race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability or age.

(5) For an employer, an employment agency or a labor organization, with respect to all employment related purposes, including receipt of benefits under fringe benefit programs, not to treat women affected by pregnancy, childbirth, or disabilties related to pregnancy or childbirth, the same as other persons who are not so affected but who are similar in the ability or inability to work.

363.03 Unfair Discriminatory Practices.

Subd. 7. **Reprisals.** It is unfair discriminatory practice for any employer, labor organization, employment agency, public accomodation, public service, educational institution, or owner, lessor, lessee, sublessee, assignee or managing agent of any real property, or any real estate broker, real estate salesperson or employee or agent thereof to intentionally engage in any reprisal against any person because that person:

(1) Opposed a practice forbidden under this chapter or has filed a charge, testified, assisted, or participated in any matter in an investigation, proceeding or hearing under this chapter; or

(2) Associated with a person or group of persons of different race, color, creed, religion or national origin.

A reprisal includes, but is not limited to, any form of intimidation, retaliation or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in the activities listed in clause (1) or (2); refuse to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status; or inform another employer that the individual has engaged in the activities listed in clause (1) or (2).

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this secion, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

AMENDMENT XIV.

§1. Citizenship rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.